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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 234.

UNITED STATES OF AMERICA,
Petitioner,

v.

LULA HICKEY THOMAS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

For the Respondent in Opposition.

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For the Respondent in Opposition.

The statements contained in the petition for writ of certiorari filed herein correctly set forth the reference to the opinions of the courts below, the statute under which the jurisdiction of this court is invoked, the question presented, and the statutes involved. Furthermore, the statement of the case set forth in the petition accurately portrays the contents of the record and the history of this case insofar as it is necessary to make reference thereto in connection with this proceeding. Therefore, we do not lengthen this brief by a repetition on these matters.

ARGUMENT.

1. The first reason assigned by the petitioner for the granting of the writ in the case at bar is its contention that there is a conflict of views among the several Courts of Appeals on the question here presented, that is, whether one claiming to be in loco parentis to an insured serviceman is a permissible beneficiary under Sections 601 (f) and 602 (g) of the National Service Life Insurance Act [54 Stat. 1008, as amended by Act of July 11, 1942, 56 Stat. 657, Title 38, U. S. C. 801 (f) and 802 (g)], where the relationship had its inception after the insured had reached his majority and where such insured was neither physically nor mentally incapacitated.

We most respectfully submit that where this question has been directly involved there is no real conflict of views expressed in the opinions of the various Courts of Appeals. In the case of Zazove v. United States, 156 F. (2d) 24 (C. A. 7), in an able opinion by Judge Minton, now Mr. Justice Minton, a direct holding was made that the relationship of in loco parentis could be created where it had its inception after the insured had reached his majority. The holding of the Court of Appeals in the case at bar is in exact accord with the decision in the **Zazove** case.

In the **Zazove** case the insured was twenty-five (25) years old when he went to live with the beneficiary, who was at that time forty-eight (48) years of age. He continued to live with the beneficiary as one of the family until he entered the military service. In the insurance certificate the beneficiary was designated as the insured's aunt, although in truth she was not related to the insured. The United States contended that the beneficiary was not entitled to recover because she did not stand in loco parentis to the insured since he was an adult when he came to live in the beneficiary's household. The Court, speaking

through Judge Minton, rejected the Government's contention saying (p. 26):

> "The statute as originally enacted and as amended does not define the words in loco parentis. No regulation of the Veterans' Administration defines the words. The statute, however, is a remedial one and should be liberally construed in favor of the insured and to carry out his intentions . . . It is clear beyond any doubt that the soldier wished the plaintiff to receive the insurance. Did Congress use the words in loco parentis as descriptive words, or did it use the words with the common-law limitation upon them, namely, that the relation could not exist unless the insured were a minor? We find no limitation in the words of Congress. We think they were used as descriptive words and were not to be restricted to the 'stick in the bark' legal connotations usually attached at common law."
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> * * * * * * *
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> "One standing in the place of a parent may give more than material things to that relationship. Not only material help may flow from such a relationship. Some of the most worthwhile, precious and cherished things in one's life may come therefrom wholly separate and apart from the rights of support and maintenance. In our opinion, if the person named as beneficiary stands in fact in the relation of a parent toward the insured, yielding whatsoever there is of substance or sentiment to the relationship, the fact that the person who is the recipient of the fruits of such relationship is an adult is immaterial."

Perhaps we should point out that this **Zazove** case finally reached this Court, but the question here involved, that is, the meaning of the term in loco parentis, as used in the National Service Life Insurance Act, was not involved in the review of the case by this Court. The only question

involved in that review was the method of calculating benefits. See **United States v. Zazove**, 334 U. S. 602, 92 L. ed. 1601.

The decision of the Court of Appeals in the case at bar followed and is in accord with the **Zazove** opinion.

In petitioner's brief it is stated that the **Zazove** case and the case at bar are in conflict with the opinion of the Court of Appeals for the Fifth Circuit in the case of **Bland v. United States**, 185 F. (2d) 395, 396, and with **Strauss v. United States**, 160 F. (2d) 1017, 1019 (C. A. 2).

We would point out that in the **Bland** case, while the Court makes the statement that there is a conflict of authority as to whether the in loco parentis relation can arise with regard to one who is at the time of the claimed inception an adult, "and this Court stands with those courts holding that it cannot," that statement had no application whatsoever to the state of facts involved in the **Bland** case. There the veteran was only eleven (11) years old at the time the relationship arose; he had reached his majority before he entered the military service, and the question involved was whether the relationship continued—not whether it had its inception—after the insured reached his majority. For its authority on the statement that the Fifth Circuit "stands with those courts holding" that the relationship cannot arise with regard to one who is an adult at the time of its inception, the Court cited **United States v. McMaster**, 174 F. (2d) 257 (C. A. 5). We would point out, however, that in the **McMaster** case, while the Court discussed at some length this particular question and intimated an inclination to hold contrary to our contention in the case at bar, that the statements made by the Court are not a precedent because they were pure dicta. The Court itself, in the concluding portion of its opinion in that case, said, "We do not find it necessary to say that

one can never stand in loco parentis to an adult," and found as a matter of fact that regardless of age this relationship did not exist between the soldier and the claimant.

In the case of **Strauss v. United States**, supra, which is the other case referred to in petitioner's brief as pronouncing a holding contra to the holding of the Court of Appeals in the case at bar, the insured was only seventeen (17) years of age when he entered the military service and only eighteen (18) when he met his death. The question of the inception of the relationship of in loco parentis with one who had reached his majority was in nowise involved in that case. While the Court in its opinion therein uses language indicating that if the latter situation were involved it might feel inclined to hold that such relationship could not then arise, this statement is pure dictum. The Court in the course of its opinion (page 1019) uses the following language:

> "The cases dealing with the problem of whether an individual may be in loco parentis to an adult are not applicable here . . . The Court below found that up to the time of the insured's 17th birthday, the defendant never assumed the obligation of providing for his care and support, and that she had never shown any intention of assuming that obligation. That finding was supported by the evidence, and on that basis we think the judgment below should be affirmed."

The **Bland** case and the **Strauss** case are the only cases mentioned in the petition filed herein as showing a conflict of opinion with the decision of the Court of Appeals in the case at bar. The analysis we have just made, we believe, shows conclusively that there is not a real conflict of opinion between those cases and the case at bar. It is only "in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit

Courts of Appeals'' that the writ of certiorari is granted by this Court.

Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 67 L. ed. 712;

Wilkerson v. McCarthy, 336 U. S. 53, 93 L. ed. 497;

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U. S. 498, 95 L. ed. 318 (Adv.).

2. The second reason assigned by the petitioner for the granting of the writ is its contention that the case involves principles the settlement of which is important to the public as distinguished from that of the parties. We insist that the petition fails to make any such showing.

The sole question here involved, as admitted by petitioner, is whether the claimant in the case at bar is a permissible beneficiary under Section 602 (g) of the National Service Life Insurance Act. This section of this Act was superseded by Section 4 of the Act of August 1, 1946 [60 Stat. 781, 38 U. S. C. 802 (g)]. During the period that the National Service Life Insurance Act was in effect up until August 1, 1946, there was a limitation by virtue of Section 602 (g) of the Act on the beneficiaries who could be named in these policies, but by the amendment of 1946 as to policies maturing after August, 1946, all limitation on the designation of beneficiaries was removed. By virtue of the statute of limitations provided for in this Act (Title 38, U. S. C., Sec. 445), there is little likelihood of many actions arising or claims being asserted wherein the question involved in this litigation will arise. The same may be said for the fear expressed in the petition that the decision rendered in this case might affect the liability of the Government for erroneous payments of benefits heretofore made by the Veterans' Administration.

Furthermore, we would point out that the **Zazove** case was decided by the Court of Appeals for the Seventh Cir-

cuit in 1946 and a careful search of the Court decisions rendered during the five years that that opinion has been on the books as the one controlling appellate decision on this question, shows conclusively that the fears expressed by the Government are wholly unwarranted and have not shown up as realities.

In this respect we might also point out that judging by the judicial history of the **Zazove** case, following the decision of the Court of Appeals thereon, in which opinion a similar result was arrived at as in the case at bar, the United States saw no such importance to the public in that opinion as is now claimed. Judging by the fact that the writ of certiorari applied for in that case was granted without limitation (332 U. S. 835) and this Court in passing upon the case made no reference to the question here involved (334 U. S. 602), evidently the United States did not consider this matter of sufficient public importance to press the question here involved upon this Court when the **Zazove** case was reviewed.

The argument made in the present petition to the effect that the decision in the case at bar will be controlling on the interpretation of Section 3 of the Servicemen's Indemnity Act of 1951 (P. L. 23, 82nd Cong., 1st Sess.), in which Act the words "in loco parentis" are used, seems to us to be wholly without merit. The context of that Act, the history of the enactment of that legislation, and the surrounding circumstances of its enactment, are all widely at variance, of course, with the Act now under consideration. Therefore, in our opinion the correct interpretation and proper construction of this later statute should not be determined by the Court in the case at bar.

The legislative history of the Act now under consideration, which is rather fully referred to in the petition, may be a matter for consideration of the Court in the event the writ applied for herein be granted, but in our opinion

that legislative history is of no value to the Court in determining whether or not a proper case is presented for the issuance of the writ. Therefore, we refrain from making any reply thereto and from calling attention to certain discussions, overlooked by petitioner, and which occurred during the debate in Congress on this particular Act.

Neither do we think a discussion of the type of construction which should be given to the words "in loco parentis" as used in the statute, that is, whether these words ever had "a generally accepted common law meaning" or whether they are to be given a liberal construction regardless of any generally accepted common law meaning applied thereto is of value to the Court on the question presented in the petition. Therefore, we are likewise refraining from any discussion of this question although petitioner has dealt with it at some length.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the petition filed herein should be denied.

Respectfully submitted,

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